IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. CIVIL SPECIAL APPEAL (WRIT) NO.579 of 2007

For Approval and Signature :

HONOURABLE THE ACTING CHIEF JUSTICE MR.J.M.PANCHAL

HONOURABLE MR.JUSTICE BHANWAROO KHAN

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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Smt. Narayani - Appellant
Versus
Board of Revenue & Ors. - Respondents

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Appearance :

Mr. G.R. Punia, for the appellant.

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CORAM:HONOURABLE THE ACTING CHIEF JUSTICE MR.J.M.PANCHAL
and
HONOURABLE MR.JUSTICE BHANWAROO KHAN

Date : 16/08/2007

ORAL JUDGMENT

(Per : HONOURABLE THE ACTING CHIEF JUSTICE MR.J.M.PANCHAL)

The instant appeal is directed against the order dated April 4, 2007 rendered by the learned Single Judge in S.B. Civil Writ Petition no.3457/2006 by which interim stay order dated July 17, 2006 restraining the Assistant Collector, Deedwana from proceeding further with the suit filed by Mr. Nathu Ram and 4 others, is vacated.

(1) Moola Ram (2) Nola Ram (3) Mana Ram (4) Ram Niwas (5) Om Prakash (6) Ghasi Ram and (7) Ms. Bhanwari filed a suit against the appellant and six others for a declaration that the suit land was ancestral property and liable to be partitioned and also prayed to partition the same. The suit was filed in the Court of Assistant Collector, Deedwana. The Assistant Collector, Deedwana decreed the same by judgment dated July 14, 2003. Feeling aggrieved, the appellant filed an appeal before the Revenue Appellate Authority which was allowed on January 8, 2004.

(1) Nathu Ram (2) Shiv Bhagwan (3) Gordhan (4) Keshar Devi and (5) Rami Devi have filed another suit for declaration and partition in the Court of Assistant Collector, Deedwana. Therefore, the appellant filed an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 with a request to reject the plaint as it was barred by res judicata. The Assistant Collector, Deedwana rejected the said application by order dated February 19, 2004.

Thereupon, the appellant invoked revisional jurisdiction of Board of Revenue. The revision filed by the appellant was rejected by the Board of Revenue by an order dated March 31, 2006. Thereupon, the appellant has invoked extra ordinary jurisdiction of this Court under Article 226 of the Constitution by filing S.B. Civil Writ Petition no.3457/2006. Initially the learned Single Judge of this Court granted interim stay by order dated July 17, 2006 and restrained the Assistant Collector, Deedwana from proceeding further with the suit filed by Nathu Ram and others. Thereafter, the matter was placed for further hearing regarding grant of interim relief. It was noticed that an appeal at the instance of Moola Ram and others who had filed earlier suit, was pending before the Board of Revenue, and therefore the decision rendered by the Assistant Collector, Deedwana in the suit filed by Moola Ram had not attained finality. Under the circumstances, the learned Single Judge has vacated the interim relief by order dated April 4, 2007 giving rise to the instant appeal.

This Court has heard Mr. G.R. Punia, learned counsel for the appellant and considered the documents forming part of the petition.

The fact that decree passed by the Revenue Appellate Authority on January 8, 2004 has not attained finality, is not in dispute. Under the

circumstances, this Court is of the opinion that the application filed by the appellant under Order 7 Rule 11 of the Code of Civil Procedure, 1908 with a request to reject the plaint as it was barred by res judicata was misconceived. At the best the appellant could have filed application under Section 10 of the Code for stay of subsequent suit filed by Nathu Ram and others but application under Order 7 Rule 11 was misconceived.

Under the circumstances, this Court is of the opinion that the Assistant Collector, Deedwana was justified in rejecting the said application by order dated February 19, 2004. So also, the Board of Revenue was justified in rejecting the revision filed by the appellant by order dated March 31, 2006. The writ petition no.3457/2006 which is filed by the appellant cannot be entertained and is liable to be rejected. Under the circumstances, the learned counsel for the appellant seeks permission to withdraw civil writ petition no.3457/2006 which is pending before the learned Single Judge and prays to reserve liberty to appellant to file application under Section 10 of the Code of Civil Procedure, 1908.

Having regard to the facts of the case, permission to withdraw civil writ petition no.3457/2006 is granted.

It is clarified that the appellant, if so advised, would be entitled to file application under Section 10 of the Code of Civil Procedure, 1908 and if such an application is filed, the same shall be decided by the competent court in accordance with law and without being influenced either by the order dated February 19, 2004 passed by Assistant Collector by which application submitted by the appellant under Order 7 Rule 11 was rejected or by order dated March 31, 2006 rendered by the Board of Revenue by which revision application filed by the appellant was rejected.

Subject to the above-referred-to clarification, the writ petition no. 3457/2006 stands disposed of as withdrawn.

As the Writ Petition no.3457/2006 is disposed of as withdrawn by an order dated August 16, 2007, the instant appeal has become infructuous and deserves to be disposed of accordingly.

Accordingly, the instant appeal is disposed of as having become infructuous.

[BHANWAROO KHAN],J. [J.M.PANCHAL],ACTG.CJ.

Praveen